

# Judicial Misconduct in Criminal Cases: It's Not Just the Counsel Who May Be Ineffective and Unprofessional

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When evaluating the success or failure of the Supreme Court's decision in *Gideon v. Wainwright*<sup>1</sup> in ensuring the effective assistance of counsel, the focus has often been on the poor quality of representation provided to indigents due to the inadequate funding of public defender or legal aid programs.<sup>2</sup> This article will focus on the role of the trial judge, in particular the failure of trial courts to act to ensure that the constitutional guarantees to the effective assistance of counsel and to a fair trial are indeed honored.

The vast majority of criminal prosecutions throughout the country result in the defendant entering a plea of guilty.<sup>3</sup> The Supreme Court, in *Brady v. United*

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<sup>1</sup> 372 U.S. 335 (1963). The *Gideon* court overturned *Betts v. Brady*, 316 U.S. 455 (1942), which had held that the right to counsel was not applicable to all felony prosecutions but rather only for those where denial of counsel would be "shocking to the universal sense of justice." *Id.* at 462.

<sup>2</sup> See, e.g., Monroe H. Freedman, *An Ethical Manifesto For Public Defenders*, 39 VAL. U. L. REV. 911, 914 (2005) (noting that underfunding of public defender and legal aid offices has led to a situation where lawyers have far more clients than they can competently represent); see also E.E. (Bo) Edwards, *From the President: Getting Around Gideon: The Illusion of Effective Assistance of Counsel*, 28 CHAMPION 4 (2004) (explaining that chronic underfunding across the country continues to result in the denial of effective assistance to the poor accused of crime). Although the problems for indigent defendants are greatest in state courts, counsel for the poor confront inadequate resources in federal courts as well. RICHARD KLEIN & ROBERT SPANGENBERG, *THE INDIGENT DEFENSE CRISIS* 1-2 (1993). The inadequate funding for lawyers representing the indigent also impacts those counsel who represent the poor in civil matters. See, e.g., Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999). The scarcity of resources available for poverty lawyers engaging in public interest litigation is a reality that is likely to continue. *Id.*

<sup>3</sup> Of all felons sentenced in state courts in 2002, 95% had entered guilty pleas, 2% had been convicted in a jury trial, and 3% were found guilty at a bench trial. MATTHEW DUROSE & PATRICK LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, *FELONY SENTENCES IN STATE COURTS* 8 (2004). In California, for the 2003-04 fiscal year, 74% of dispositions of felony filings resulted in pre-trial guilty pleas. JUDICIAL COUNCIL OF CAL., 2005 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 119, tbl. 8a (2005). In Illinois, 84.6% of convicted felons in 2003 had pled guilty. ADMINISTRATIVE OFFICE OF THE ILL. CTS., ANNUAL REPORT OF THE ILL. CTS., STATISTICAL SUMMARY 44 (2003). In New York State, 87% of felony convictions in 2004 were the result of guilty pleas. CHIEF ADMIN. OF THE CTS., TWENTY-SEVENTH ANNUAL REPORT 11 (2005). In federal court prosecutions across the nation, 95% of all convictions resulted from guilty pleas for the one year period ending Sept. 30, 2003. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE,

*States*,<sup>4</sup> has upheld the constitutionality of the plea bargaining process, and in *Santobello v. New York*,<sup>5</sup> recognized that plea bargaining is an indispensable aspect of the criminal justice system.<sup>6</sup> The process of plea bargaining is regulated by the Federal Rules of Criminal Procedure,<sup>7</sup> the American Bar Association (ABA) Standards Relating to the Administration of Justice,<sup>8</sup> the Uniform Rules of Criminal Procedure,<sup>9</sup> and the Model Code of Pre-Arrest Procedure.<sup>10</sup>

Judicial involvement in the plea bargaining process in state courts can range from virtually non-existent to extremely controlling. It is in the high caseload, urban areas where judicial participation in the process is typically most marked, and most problematic.<sup>11</sup> Administrative pressures prompt judges to move the court calendar by encouraging defendants to enter guilty pleas and thereby dispose of cases.<sup>12</sup> As the New York State Court of Appeals bluntly stated in *People v. Selikoff*,<sup>13</sup> the policy of the trial court which was directed at attaining guilty pleas was "acutely essential to relieve court calendar congestion . . . . In budget-starved urban criminal courts, the negotiated plea literally staves off collapse of the law enforcement system."<sup>14</sup>

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COMPENDIUM OF FEDERAL JUSTICE STATISTICS, FEDERAL CRIMINAL CASE PROCESSING OCTOBER 1, 2002–SEPTEMBER 30, 2003, at 62 (2003).

<sup>4</sup> 397 U.S. 742 (1970).

<sup>5</sup> 404 U.S. 257 (1971).

<sup>6</sup> *Id.* at 260–61.

<sup>7</sup> FED. R. CRIM. P. 11.

<sup>8</sup> ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 295–312 (1974).

<sup>9</sup> UNIF. R. CRIM. P. 443.

<sup>10</sup> MODEL CODE OF PRE-ARREST P. § 350.3 (1975).

<sup>11</sup> However, a recent exhaustive study of representation of indigent defendants throughout the country found that the pressures on defendants to plead guilty were certainly true elsewhere as well. For example, a study of all felonies prosecuted in a five year period in one rural county in Mississippi revealed that 42% of indigent defendants entered guilty pleas on the day of arraignment—which was also the first day that the defendants met their attorneys. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 16 (2004) [hereinafter *LEGAL AID AND INDIGENT DEFENDANTS*].

<sup>12</sup> In one county in Georgia, a lawsuit was brought challenging the quality of representation provided indigent defendants and the following was said to be the courtroom routine:

The judge typically would call the defendant forward, ask the prosecutor what the offer was, and then tell the defendant he would follow the prosecutor's recommendation. There was no mention of counsel. The defendant would have no idea what to do, being thoroughly intimidated by the courtroom, judge etc., and often turned to the prosecutor, who was always happy to discuss the offer. The defendant would then enter the plea.

*Id.* at 25.

<sup>13</sup> 318 N.E.2d 784 (N.Y. 1974).

<sup>14</sup> *Id.* at 788 (citation omitted). Not all parts of the criminal justice system are equally starved. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES*, 2003, at 1, 3 (2006) (stating that expenditures of \$185 billion in 2003 for

It has long been the case in our urban criminal courts that “the need simply to dispose of cases has overshadowed everything else . . . .”<sup>15</sup> The Supreme Court, in *Santobello v. New York*,<sup>16</sup> one of its earliest decisions upholding plea bargaining, observed that “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”<sup>17</sup> Plea bargaining is relied upon by public defenders not because it is always in their clients’ best interest, but rather because it has become “a necessary technique to deal with an overwhelming caseload.”<sup>18</sup> It is not an overstatement to say that the utilization of plea bargaining has become critical to the very survival of many defender organizations. Indeed, the primary rationale for the formation of public defender offices as the mode in which governments chose to meet their obligations under *Gideon*,<sup>19</sup> has been that it is a cheap method for representing as many defendants as possible in the shortest amount of time.<sup>20</sup>

To be sure, the pressures and the needs of defenders to manage their caseloads can cause defenders to devote an insufficient amount of time to the representation

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police, corrections, judicial and legal activities, represented an increase of 418% from expenditures in 1982; the Federal Government during that period increased spending for the police by 708% and corrections by 925%).

<sup>15</sup> CRIMINAL CTS. COMM. OF THE ASSOC. OF THE BAR OF THE CITY OF NEW YORK, SAVING THE CRIMINAL COURT: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK 2 (1983).

<sup>16</sup> 404 U.S. 257 (1971).

<sup>17</sup> *Id.* at 260.

<sup>18</sup> STEPHEN R. BING & S. STEPHEN ROSENFELD, THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON 32 (1970) (describing the use of plea bargaining by the Massachusetts Defenders Committee). A Michigan study revealed that appointed counsel pled their clients guilty more than twice as frequently as did privately retained counsel. See Barbara R. Levine, *Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. TOL. L. REV. 1275, 1325 n.208 (1984). An analysis of a Louisiana public defender office revealed that defenders, when first meeting with their clients, conducted only a perfunctory interview which elicited no personal data from the defendant and failed to probe into the facts. AM. UNIV. CRIM. CT. TECHNICAL ASSISTANCE PROJECT, AN EVALUATION OF INDIGENT CRIMINAL DEFENSE SYSTEMS IN THE UNITED STATES FINAL REPORT 408 (1976). The Evaluation found that “[t]he interview was simply geared toward inducing the defendant to plead guilty, and this seems to be the general spirit of the . . . office.” *Id.*

<sup>19</sup> See *Gideon*, 372 U.S. at 335.

<sup>20</sup> Utilizing defender offices is certainly cheaper than the appointment of private counsel to represent indigent defendants in some areas of North Carolina. Attorneys there, who claimed to have worked the greatest number of hours on court-appointed cases, were reported to have been reimbursed well into the six figures for the year 2004. The only problem was that a six-month-long investigation by the *Charlotte Observer* revealed widespread fraud and over-billing by the court-appointed counsel. Molly McDonough, *Big Money in Indigent Law? Newspaper Shows Some Lawyers Make Six Figures, But They Point to Their Heavy Caseloads*, 5 ABA J. EREPORT, Mar. 31, 2006, at <http://www.abanet.org/journal/redesign/m31jail.html>

of each of their clients.<sup>21</sup> Inadequate preparation and investigation of the case as well as the failure to engage in thorough and effective communication with the client are perhaps the most egregious abuses.<sup>22</sup> Even the most competent of attorneys simply will not be able to render the effective assistance of counsel if the lack of preparation has prevented counsel from uncovering readily available information that may well have yielded a more favorable plea bargain, a more effective cross-examination of a key trial witness, or a more lenient sentence were the defendant to be convicted at trial. Courts have long acknowledged that "effective assistance refers not only to forensic skills but to painstaking investigation in preparation for trial."<sup>23</sup> The Ninth Circuit, in *Brubaker v. Dickson*,<sup>24</sup> has gone as far as to conclude that the failure of counsel to investigate, research, and prepare is equivalent to no representation at all.<sup>25</sup>

The Supreme Court has extended the right to counsel to encompass all of the critical stages of the proceedings including the process of custodial interrogation,<sup>26</sup> a lineup or other pre-trial identification proceeding,<sup>27</sup> a probation revocation hearing,<sup>28</sup> a preliminary hearing,<sup>29</sup> and a parole revocation hearing.<sup>30</sup> *In re Gault*<sup>31</sup> extended the right to counsel to juvenile cases, and although *Douglas v. California*<sup>32</sup> guaranteed the right to counsel during the first appeal of a conviction,<sup>33</sup> it was not until 1985 in *Evitts v. Lucey*,<sup>34</sup> that the Court held there was a guarantee of *effective* assistance of counsel on that same appeal.<sup>35</sup> As would be

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<sup>21</sup> See Edwards, *supra* note 2, at 4–5 (explaining that because of the overwhelming caseloads of public defenders the vast majority of indigent defendants do not receive a minimally adequate defense).

<sup>22</sup> Organizations concerned with the quality of counsel provided indigent defendants are increasingly calling for the adoption of specific standards for competent representation and formation of an agency to oversee and ensure that the standards are complied with. See, e.g., John Caher, *Advocates Call for Statewide Public Defense*, N.Y.L.J., Mar. 17, 2005, at 1 (citing defense advocates' call for a statewide umbrella agency to set and enforce representation guidelines).

<sup>23</sup> See, e.g., *Wolfs v. Britton*, 509 F.2d 304, 309 (8th Cir. 1975).

<sup>24</sup> 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963).

<sup>25</sup> *Id.* at 38–39.

<sup>26</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>27</sup> *United States v. Wade*, 388 U.S. 218 (1967).

<sup>28</sup> *Mempa v. Rhay*, 389 U.S. 128 (1967).

<sup>29</sup> *Coleman v. Alabama*, 399 U.S. 1 (1970).

<sup>30</sup> *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

<sup>31</sup> 387 U.S. 1 (1967).

<sup>32</sup> 372 U.S. 353 (1963).

<sup>33</sup> The right for counsel on appeal does not include, however, the right to have counsel file frivolous claims. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751–54 (1983).

<sup>34</sup> 469 U.S. 387 (1985).

<sup>35</sup> Justice Brennan, writing for the majority, explained that "nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings

expected, these increased duties and responsibilities that were imposed on counsel has led to an increase in claims of ineffective assistance.<sup>36</sup> The Sixth Amendment to the United States Constitution provides merely for the "assistance of counsel," but the Supreme Court in *McMann v. Richardson*<sup>37</sup> made it clear that "defendants facing felony charges are entitled to the *effective* assistance of *competent* counsel."<sup>38</sup>

The Supreme Court in *McMann* held that the mandate for effective counsel included the obligation by counsel to competently and fully advise his client during plea negotiations.<sup>39</sup> A guilty plea that has been entered without the effective assistance of counsel is invalid.<sup>40</sup> In order for the plea to be constitutionally offered, the defendant must have waived his right to confront witnesses,<sup>41</sup> the right to a trial by a jury of his peers,<sup>42</sup> and the right to challenge the introduction of evidence that is to be used against him.<sup>43</sup>

Defense counsel has obligations to the defendant that must precede any advice to his client to plead guilty. ABA Criminal Justice Standard 4-6.1 warns the defense attorney that "[u]nder no circumstances should a defense counsel recommend to a defendant acceptance of a plea unless *appropriate investigation* and study of the case has been completed, including an analysis of controlling law

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constitutionally adequate; a party whose counsel is unable to provide effective assistance is in no better position than one who has no counsel at all." *Id.* at 396.

<sup>36</sup> One reason for the widespread ineffectiveness of counsel for the indigent has been the failure of the courts to endorse specific standards for the appointment of counsel in criminal cases. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court failed in its obligation to give power to the Sixth Amendment's requirement of effective counsel, and informed lower courts reviewing ineffectiveness claims that "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . [A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. See generally Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433 (1999). The President of the New York State Association of Criminal Defense Lawyers, when calling for the establishment of a defender-general to complement the role of the attorney-general, queried (rhetorically perhaps), "Why are there no standards for the defense?" Caher, *supra* note 22.

<sup>37</sup> 397 U.S. 759 (1970).

<sup>38</sup> *Id.* at 771 (emphasis added). Some circuits had held that the competency of the assistance provided was not of constitutional significance. For example, the D.C. Circuit Court of Appeals stated that "[i]t is clear that once competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment. All that amendment requires is that the accused shall have the assistance of counsel." *Diggs v. Welch*, 148 F.2d 667, 668 (D.C. Cir. 1945).

<sup>39</sup> 397 U.S. at 770-71 (the advice of the attorney regarding plea considerations must be "within the range of competence demanded of attorneys in criminal cases").

<sup>40</sup> *United States ex rel. Healey v. Cannon*, 553 F.2d 1052, 1056 (7th Cir. 1977).

<sup>41</sup> *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

<sup>42</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

<sup>43</sup> *McMann v. Richardson*, 397 U.S. 759, 782 (1970).

and the evidence likely to be introduced at trial.”<sup>44</sup> The Standards add that the duty of counsel to investigate exists even if the defendant states his desire to plead guilty and admits facts which do constitute guilt.<sup>45</sup> An informed decision to plead guilty must assess the likelihood of a conviction at trial; therefore, investigation by counsel is required to determine the strength of the prosecutor's case.<sup>46</sup> Witnesses must be interviewed, possible defenses explored, and viability of motions to suppress assessed.<sup>47</sup> Legal research into the relevant case law must often be conducted because the belief of the defendant that he is guilty *in fact* may, nevertheless, not be supported by the elements of the statute that must be proven in order to show guilt as a *matter of law*.<sup>48</sup> Certainly, the defendant's posture during plea negotiations will be strengthened by counsel's uncovering unexpected weaknesses in the prosecution's case.

Counsel who has failed to investigate the facts and law surrounding the charges against his client may also have failed in his obligation to properly communicate with his client. All too often attorneys violate their professional obligations under both the Model Code of Professional Responsibility<sup>49</sup> and the Model Rules of Professional Conduct.<sup>50</sup> The Code's Disciplinary Rule entitled “Failing to Act Competently”<sup>51</sup> mandates that a lawyer not “[h]andle a legal matter without preparation adequate in the circumstances”<sup>52</sup> nor “[n]eglect a legal matter entrusted to him.”<sup>53</sup> The Model Rule defining “Competence” requires counsel to

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<sup>44</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-6.1(b) (3d ed. 1993) (emphasis added) [hereinafter PROSECUTION FUNCTION].

<sup>45</sup> *Id.* at Standard 4-4.1(a).

<sup>46</sup> Yet it is the process of investigation that is so often sacrificed due to overwhelming caseloads of defenders. See, e.g., Julia Robb, *Public Defender System on Trial in Louisiana*, ALEXANDRIA TOWN TALK, Feb. 9, 2004, available at [http://www.nacdl.org/\\_852566CF0070A126.nsf/0/666741C18D20FD4185256E350066B9BD?Open](http://www.nacdl.org/_852566CF0070A126.nsf/0/666741C18D20FD4185256E350066B9BD?Open) (explaining that public defenders are so overloaded that they are unable to conduct thorough investigations for their clients when required).

<sup>47</sup> See *Scott v. Wainwright*, 698 F.2d 427, 429 (11th Cir. 1983) (stating that counsel must have become knowledgeable about the facts and relevant law in order to appropriately advise the defendant of the available options).

<sup>48</sup> In order for counsel to provide his client with effective counseling, counsel must provide the defendant with an “understanding of the law in relation to the facts.” *Walker v. Caldwell*, 476 F.2d 213, 218 (5th Cir. 1973) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)), *superseded by* FED. R. CRIM. P. 11(h).

<sup>49</sup> MODEL CODE OF PROF'L RESPONSIBILITY (1980).

<sup>50</sup> MODEL RULES OF PROF'L CONDUCT (1983).

<sup>51</sup> MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101 (1980).

<sup>52</sup> *Id.* DR 6-101(A)(2).

<sup>53</sup> *Id.* DR 6-101(A)(3). Most of the Formal and Informal Opinions of the ABA Commission on Professional Ethics which interpret the Code as to issues of competence, focus on neglect. See ABA Comm. on Prof'l Ethics, Informal Op. 1442 (1979). Neglect is explained in ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1273 (1973): “Neglect involves indifference and a

attain the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>54</sup> Not only, of course, should a judge *never* pressure an attorney to get his client to plead guilty when the lawyer has not done what is required for competent representation, but the judge should not even *permit* an attorney who is an officer in his court to violate professional standards. And that means that, at times, the judge should simply refuse to entertain the plea deal which is presented to him.

Professional standards clearly indicate that any decision to plead guilty and not risk trial is one that the defendant, and not counsel, must make.<sup>55</sup> It is mandatory that the defendant’s attorney, therefore, devote time with the defendant communicating what counsel’s investigation has revealed regarding the strength of the prosecutor’s case and the applicable issues of law, and advising his client of the possible results of the various options open to him.<sup>56</sup> As the Supreme Court noted in *Tomkins v. Missouri*,<sup>57</sup> informed and knowledgeable advice from counsel is required in order to overcome a client’s ignorance or bewilderment.<sup>58</sup>

The judge should ensure that the defense counsel is informed prior to the entry of any plea of any exculpatory material of which the prosecutor is aware.<sup>59</sup> Both the ABA Model Rules of Professional Conduct<sup>60</sup> as well as the ABA Standards for Criminal Justice<sup>61</sup> require the prosecutor to make early and timely disclosure of exculpatory information.<sup>62</sup> The standards, like all ABA approved standards, may be taking on more significance as of late due to two recent

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consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client . . . .”

<sup>54</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 (1983).

<sup>55</sup> See *id.* R. 1.2(a) (mandating that “In a criminal case, the lawyer shall abide by the client’s decision . . . as to a plea to be entered . . .”). See also MODEL CODE OF PROF’L RESPONSIBILITY EC 7-7 (1980).

<sup>56</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (1983) (explaining that the decision of the client to enter a plea of guilty is to be made “after consultation with the lawyer”). See also MODEL CODE OF PROF’L RESPONSIBILITY EC 7-7 (1992) (stating that counsel has the obligation to advise his client about the desirability of any plea).

<sup>57</sup> 323 U.S. 485, 489 (1945).

<sup>58</sup> *Id.* at 489.

<sup>59</sup> But see *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (holding that the Constitution does not mandate the prosecutor to disclose to the defendant, prior to a plea agreement, exculpatory information that might be used at trial to impeach a prosecution witness).

<sup>60</sup> MODEL RULES OF PROF’L CONDUCT (1983).

<sup>61</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993)

<sup>62</sup> Rule 3.8(d) of the MODEL RULES OF PROF’L CONDUCT (1983) requires the prosecutor to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.” See also ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-3.11(a) (3d ed. 1993) (emphasizing that the disclosure be made “at the earliest feasible opportunity”).

Supreme Court cases which do support the use of performance guidelines to review the quality of counsel's representation.<sup>63</sup> In *Wiggins v. Smith*,<sup>64</sup> the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases<sup>65</sup> were used to conclude that counsel's limited investigation for mitigating evidence indicated failure to provide effective representation.<sup>66</sup> In *Williams v. Taylor*,<sup>67</sup> the Court cited the ABA Standards for Criminal Justice<sup>68</sup> to show that counsel's failure to seek available evidence, which could have assisted the defense, constituted ineffective assistance of counsel.<sup>69</sup>

In *McMann v. Richardson*, the Supreme Court examined what is required for a plea to be successfully challenged based upon a claim by a defendant that he was denied the effective assistance of counsel.<sup>70</sup> The Court admonished trial courts that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."<sup>71</sup> Judges ought not, therefore, compound the failings of counsel by routinely accepting pleas where counsel has not done the required preparation and investigation.<sup>72</sup>

It is indeed the obligation of the trial court to ensure that the adversary system is truly functioning.<sup>73</sup> Our adversary system is based on the assumption that *both* sides have the opportunity to discover evidence that may be not only material as to the defendant's guilt or innocence but also to the determination of an appropriate sentence. The police and prosecutor may frequently over-charge the defendant in order to commence the plea bargaining process with additional leverage. How can

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<sup>63</sup> The Court had, in *Strickland v. Washington*, 466 U.S. 668, 689–690 (1984), rejected the use of "detailed guidelines" to assess effectiveness of counsel because the use of such standards "would encourage the proliferation of ineffectiveness challenges."

<sup>64</sup> 539 U.S. 510 (2003).

<sup>65</sup> ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 11.4.1(c) (1989).

<sup>66</sup> *Wiggins*, 539 U.S. at 524.

<sup>67</sup> 529 U.S. 362 (2000).

<sup>68</sup> *Id.* at 396 (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-4.1 (2d ed. 1980)).

<sup>69</sup> *Williams*, 529 U.S. at 396.

<sup>70</sup> *McMann*, 397 U.S. at 770–71.

<sup>71</sup> *Id.* at 771.

<sup>72</sup> See *State v. Draper*, 762 P.2d 602, 604–05 (Ariz. Ct. App. 1988) (explaining that it is constitutionally required that a plea be entered only after the defendant's counsel has been able to intelligently evaluate the facts of the case which may often require the interviewing of witnesses).

<sup>73</sup> If defense counsel knows that the court will not be concerned with any failure by counsel to have prepared and investigated the case, the attorney may well forgo engaging in what is required to have a functioning and effective adversary system. The court is in a powerful position to convey either what *is* or *is not* expected of counsel.



defense counsel similarly engage in "posturing," or even calling the "bluff," unless counsel has had the opportunity to investigate the alleged criminal act?

Yet it is common for defense counsel in our large urban courts to offer a guilty plea on behalf of their client within minutes of having first met the defendant.<sup>74</sup> The response of the trial court ought to be clear. The ABA Standards for Criminal Justice relating to "Pleas of Guilty"<sup>75</sup> instruct the judge that "the court should not accept the plea where it appears the defendant has not had the effective assistance of counsel."<sup>76</sup> And, in case more specific elaboration was required, the Commentary to the Standard states: "Because it is seldom possible to engage in effective negotiations minutes before the defendant is called upon to plead . . . a reasonable interval should elapse between assignment of counsel and the pleading stage."<sup>77</sup>

Judges may exploit the fact that there is a warm body with a J.D. degree that is standing next to the defendant at the time that the plea is formally being entered;<sup>78</sup> the "presence" of counsel may be used by the court to infer the "assistance" of counsel.<sup>79</sup> However, the very reason that counsel is required is to avoid just the type of perfunctory process that so commonly occurs.<sup>80</sup> In

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<sup>74</sup> An analysis of the workings of the Public Defender Office in Atlanta referred to this phenomenon as "Meet 'Em and Plead 'Em", which was a clear result of the high caseloads that each defender possessed. Trisha Renaud & Ann Woolner, *Meet 'Em and Plead 'Em*, FULTON COUNTY DAILY REP., Oct. 8, 1990, at 1. The newspaper analysis of the quality of representation provided indigents characterized the situation as "slaughterhouse justice." *Id.*

<sup>75</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 14 (2d ed. 1986).

<sup>76</sup> *Id.* Standard 14-1.4(d).

<sup>77</sup> *Id.* Standard 14-1.3 cmt. See also *Van Moltke v. Gillies*, 322 U.S. 708, 721 (1948) (noting that professionally advising a client about a plea requires an independent investigation "of the facts, circumstances, pleadings, and laws involved").

<sup>78</sup> This is sometimes referred to as the "foggy mirror test": If a mirror is placed in front of the attorney who is standing at the defendant's side and it does in fact fog, then counsel is deemed to be effective. See, e.g., RANDALL COYNE, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS TEACHER'S MANUAL 148 (1995).

<sup>79</sup> See *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). A defendant's rights in criminal prosecutions must be "adequate and effective" and not just meaningless rituals or futile gestures. *Id.* The very first Rule of the Model Rules of Professional Conduct requires counsel to provide competent representation which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

<sup>80</sup> In an intriguing pre-*Gideon* case, the Supreme Court realized that the defendant must be provided with time to consult with his attorney, "otherwise, the right to be heard by counsel would be of little worth." *Chandler v. Warden Fretag*, 348 U.S. 3, 10 (1954). See also *United States v. Decoster*, 624 F.2d 196, 219 (D.C. Cir. 1976) (MacKinnon, J., concurring). This opinion explains that:

The Sixth Amendment . . . guarantees more than the appointment of competent counsel. By its terms, one has a right to "Assistance of Counsel [for] his defense." Assistance begins with the appointment of counsel, it does not end there. In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is

*Argersinger v. Hamlin*,<sup>81</sup> the Supreme Court required the assistance of counsel due to the precise concern that were there *not* to be counsel appointed for indigent defendants, the heavy volume of cases in our criminal courts “may create an obsession for speedy dispositions, regardless of the fairness of the result.”<sup>82</sup> The Supreme Court’s mandate in *Sheppard v. Maxwell*<sup>83</sup> was clear: “[T]rial courts must take strong measures to ensure that the balance is never weighed against the accused.”<sup>84</sup>

Some appellate courts have appropriately created almost a presumption that when a guilty plea quickly follows the lawyer’s initial consultation with the defendant, there has been either neglect by counsel or that the plea was entered due to pressures of time which precluded full preparation of any defense.<sup>85</sup> Such a presumption may indeed be appropriate. Counsel’s recommendation that his client plead guilty is often not the result of evaluating the available options after having conducted a thorough investigation of the relevant facts and law. To the contrary, the guilty plea may well be the *mechanism* for relieving counsel of the need to prepare the case. The caseload of the attorney may be so great that in order for him to “process” all of his cases, many of his clients simply *must* plead guilty.<sup>86</sup> Yet a plea entered by a defendant because he knew that his lawyer was not then, and may never be, prepared and ready for trial, certainly is not a “voluntary” one on the part of the defendant.<sup>87</sup>

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provided. Clearly, in such cases, the defendant’s Sixth Amendment right to “have Assistance of Counsel” is denied.

*Id.*

<sup>81</sup> 407 U.S. 25 (1972).

<sup>82</sup> *Id.* at 34. The Court continued, stating that “[c]ounsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.” *Id.*

<sup>83</sup> 384 U.S. 333 (1966).

<sup>84</sup> *Id.* at 362.

<sup>85</sup> See, e.g., *Bryant v. Peyton*, 270 F. Supp. 353, 358 (W.D. Va. 1967).

<sup>86</sup> The responsibilities and obligations of a public defender to his client are identical to those of any privately retained lawyer; no “allowances” are made for counsel serving in a legal aid or public defender capacity. Standard 4-1.2(h) of the ABA Standards for Criminal Justice, *supra* note 45, states: “Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.” Justice Powell commented about a prior version of this standard: “This view of the public defender’s obligations to his clients has been accepted by virtually every court that has considered the issue.” *Polk County v. Dodson*, 454 U.S. 312, 318 n.6 (1981) (citing *Espinoza v. Rogers*, 470 F.2d 1174, 1175 (10th Cir. 1972) (per curiam); *Brown v. Joseph*, 463 F.2d 1046, 1048 (3d Cir. 1972). See also ABA Commn. on Professional Ethics, Formal Op. 347 (1981) (a lawyer’s mandatory obligations to prepare adequately and to provide competent representation apply to *all lawyers*, including those in offices that employ counsel to represent the indigent) (emphasis added).

<sup>87</sup> See generally *Colson v. Smith*, 438 F.2d 1075 (5th Cir. 1971).

The Supreme Court's decisions in *Gideon* and *Argersinger* mandating appointment of counsel for indigents in criminal cases did not address the manner in which the states would comply with or finance their new responsibilities.<sup>88</sup> States often chose to provide counsel in a manner which was controlled exclusively by considerations of cost. A large public defender office which was required to take what has appeared at times to be a limitless number of cases, seemed to offer the economy of scale that would lead to the lowest cost. But within just a matter of years after the *Gideon* decision, a Presidential Commission concluded that there was a "severe" shortage of counsel for indigent defendants<sup>89</sup> and that those accused of crime were merely "numbers on dockets, faceless ones to be processed and sent on their way."<sup>90</sup> The Commission found "huge caseloads" leading to the "lack of opportunity to examine cases carefully" resulting in "assembly line justice."<sup>91</sup>

Courts not only readily accept pleas where counsel has failed to provide effective representation, but the judges themselves may often inappropriately attempt to pressure an unwilling defendant to enter a plea. Judges are, to be sure, not immune from the caseload pressures that have permeated our criminal courts. Even the Supreme Court has taken note that "crowded calendars throughout the Nation impose a constant pressure on our judges to finish the business at hand."<sup>92</sup> And when a plea is taken at the first arraignment of the defendant, typically the only information that is available about the crime the defendant has allegedly committed is from the police report. The judge is, however, professionally required to "be careful to allow sufficient time" for the defense to "properly prepare their case."<sup>93</sup>

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<sup>88</sup> See *Argersinger*, 407 U.S. at 55–56 (Powell, J., concurring) (referring to the prediction of the Solicitor General that were the Court to rule as it did in *Argersinger*, there would be "backlogs," "bottlenecks" and "chaos" at the state court level. But see *id.* at 44 (Burger, J., concurring) (acknowledging the increased demands to be made on the legal profession but nevertheless concluding that the profession has "a way of rising to the burdens placed on it").

<sup>89</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 151 (1967) [hereinafter PRESIDENT'S COMMISSION].

<sup>90</sup> *Id.* A President's administration, 30 years later, was once again to acknowledge the inadequacy of resources provided defense counsel. The Attorney General at that time, Janet Reno, concluded that the "promise of *Gideon* is not completely fulfilled. Indigent defendants do not invariably receive effective assistance of counsel . . . [S]ometimes it is caused by a lack of resources . . . ." Janet Reno, Op-Ed, *Legal Service for the Poor Needs Renewed Vigilance*, USA TODAY, Mar. 1, 1998, at 13A. See also U.S. Attorney General Reno Demonstrates Her Commitment to Indigent Defense Issues, THE SPANGENBERG REP., Nov. 1997, at 14 (outlining the efforts of members of the Justice Department to address indigent defense funding).

<sup>91</sup> PRESIDENT'S COMMISSION, *supra* note 89, at 128.

<sup>92</sup> *Arizona v. Washington*, 434 U.S. 497, 516 n.35 (1978).

<sup>93</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-1.5(a) (3d ed. 2000) [hereinafter SPECIAL FUNCTIONS].

If a case on the judge's calendar has been called for judicial consideration of the matter and the prosecutor and defense counsel inform the judge that there is agreement on a plea, then the court typically does little. In the vast majority of those instances, the court will be told the D.A. recommendation for the sentence for the crime for which the defendant is to plead guilty, and the judge will agree to impose that sentence. But the judge properly has the responsibility for ensuring that the prosecutor is performing professionally and appropriately. Unlike any other attorney, the prosecutor has an ethical obligation extending beyond just the representation of his "client"; the prosecutor's responsibility encompasses the duty to seek justice and to "guard the rights of the accused as well as to enforce the rights of the public."<sup>94</sup> The court is obligated to protect defendants from prosecutorial misconduct. The district attorney, like defense counsel, is an "officer of the court"<sup>95</sup> and the court ought not abuse of what typically is very extensive prosecutorial discretion.<sup>96</sup> The ABA Standards for Criminal Justice reflect the possibility that "personal ideological, or political beliefs . . ." of prosecutors might improperly influence a prosecutor's conduct as might the "desire for personal achievement, or for personal or political success. . . ."<sup>97</sup>

But what if there is no "bargain" agreed upon? Judges may well just take things into their own hands. Since it is typically the defendant who the judge perceives to be the recalcitrant party, it is the defendant who becomes the object of the judge's attempt to "get rid of" the case. But what tools does the court have? One approach is to let the defendant know that if the defendant fails to enter a guilty plea on that day, the judge will never again impose such a "favorable" sentence. Take, for example, the judge sitting in the Supreme Court of New York State who told counsel who was standing next to the defendant: "Now the offer in this case, Mr. Barry, *for today only* is three to six which he [the defendant] obviously is not obligated to accept."<sup>98</sup> The judge made it clear that if the defendant were to refuse the offered plea and go to trial, the judge would make sure that the defendant would be sentenced to the maximum time of incarceration permitted by law.<sup>99</sup> The defendant continued in his refusal to plead guilty and responded to the judge: "I'm 19 years old, your Honor. That is Terrible. That's Terrible."<sup>100</sup> The defendant then turned toward his mother who sat weeping in the

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<sup>94</sup> PROSECUTION FUNCTION, *supra* note 44, at Standard 3-1.2 cmt.

<sup>95</sup> *Id.* Standard 3-1.2(b).

<sup>96</sup> *See id.* (indicating the prosecutor is required to "exercise sound discretion in the performance of his or her functions.").

<sup>97</sup> *See id.* Standard 3-1.3 cmt.

<sup>98</sup> Transcript of Indictment at 4, *People v. Smith*, No. 7996-98 (N.Y. Sup. Ct. 1998) [hereinafter Transcript of Indictment].

<sup>99</sup> Telephone interview with Frank Bari, attorney for the defendant (Sept. 10, 2003).

<sup>100</sup> Transcript of Indictment, *supra* note 98 at 4; *see also* Laura Italiano & Larry Celona, *Horror Suicide at Courthouse; Mom Sees Suspect's 16-Story Leap*, N.Y. POST, Oct. 30, 1998, at 5.

courtroom and told her, "Mom, I can't do it," and jumped to his death out the window of the sixteenth floor courtroom.<sup>101</sup>

The above mentioned case received press coverage because of the defendant's suicide, and not because of the coercive tactics employed by the judge. Comments such as "this is a one-time-offer", "for today only", and "I'll make sure you get sentenced to the max if you don't plead guilty now" are all too frequent to warrant newspaper headlines. There was no media coverage at all, for instance, when a juvenile court judge in Georgia stated: "I tell the minor, I will up the sentence if you take it to trial, because you could have pleaded and saved us all this trouble."<sup>102</sup> Such threats certainly can overcome one's free will and can lead many individuals to simply agree to what is being demanded of them.<sup>103</sup>

At times, the court directs the defense counsel to relay the message of the advisability of pleading guilty to the defendant. In *Commonwealth v. Longval*,<sup>104</sup> the judge told counsel that "I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know I am capable of doing that . . . ." <sup>105</sup> And judges are not reluctant to deliver on their threats, and to make sure the defendant has learned his lesson.<sup>106</sup> The judge, in *People v. Moriarity*,<sup>107</sup> told the defendant upon being sentenced after a trial:

If you'd have come in here, as you should have done in the first instance, to save the State the trouble of calling a jury, I would probably have sentenced you, as I indicated to you I would have sentenced you, to one

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<sup>101</sup> David Rohde, *Prisoner Leapt to Death Despite Plea for Suicide Watch*, N.Y. TIMES, Oct. 31, 1998, at B2.

<sup>102</sup> ABA JUVENILE JUSTICE CENTER et al., GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 31 (Patricia Puritz & Tammy Sun eds., 2001).

<sup>103</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. (1981), quoted in *United States v. Speed Joyeros*, 204 F. Supp. 2d 412, 425 (E.D. N.Y. 2002) (realizing that a threat may well "arouse such fear as precludes a party from exercising free will and judgment . . .").

<sup>104</sup> 390 N.E.2d 1117 (Mass. 1979).

<sup>105</sup> *Id.* at 1118. And deliver he did. Longval's co-defendant did accept the plea bargain and received a sentence of three years; Longval got forty to fifty years. *Id.* at 1119-20.

<sup>106</sup> It is clearly unconstitutional for a judge to explicitly punish a defendant for exercising his constitutional right to trial. As the Supreme Court stated in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978):

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional."

*Id.* at 363 (citations omitted).

<sup>107</sup> 185 N.E.2d 688 (Ill. 1962).

to life in the penitentiary. *It will cost you nine years additional*, because the sentence now is ten to life in the penitentiary.<sup>108</sup>

Any actual “negotiation” between a judge and a defendant appearing before that judge is extraordinarily difficult due to the clearly unequal power of the two parties. Even when there is no actual *intention* on the part of the judge to coerce the defendant to plead guilty, the *impact* of the judicial posturing will be of crucial significance.<sup>109</sup> It is a given in any understanding of a true “negotiation” that there need be relatively comparable positions of power on each side. The judge, however, who is in the all-powerful position to imprison the defendant, is all-mighty when contrasted to an individual who is desperately seeking the most lenient sentence from the court.

The very first Canon of the American Bar Association Model Code of Judicial Conduct emphasizes the need for judges to act with integrity<sup>110</sup> and impartiality so that the public will have confidence in the judiciary.<sup>111</sup> The Supreme Court has mandated that the lower courts “must ever be concerned with preserving the integrity of the judicial process.”<sup>112</sup> Our criminal courts are perhaps the part of our justice system that is most visible to the public, and since the vast majority of criminal prosecutions result in guilty pleas,<sup>113</sup> the ethical conduct of the judiciary in the plea bargaining process is of critical import. Even the “appearance of impropriety” must be avoided,<sup>114</sup> and the Commentary to Canon 1 of the Code instructs that violating the Code “does injury to the system of government under law.”<sup>115</sup> The very first paragraph of the Preamble to the Code describes judicial

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<sup>108</sup> *Id.* at 688 (emphasis added).

<sup>109</sup> *See, e.g.,* United States v. Tateo, 214 F. Supp. 560, 564 (S.D.N.Y. 1963).

<sup>110</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2004). The Commentary to this Canon was amended in 2003 to elaborate on what is meant by integrity: “A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness and soundness of character.” *Id.* One would assume that any resemblance to the Boy Scout Pledge is, of course, completely unintended.

<sup>111</sup> *See id.* Canon 2A reiterates the need for the judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” *Id.* Canon 2A.

<sup>112</sup> *Stone v. Powell*, 428 U.S. 465, 485 (1976). *See also* *Elkins v. United States*, 364 U.S. 206, 222 (1960) (discussing the “imperative of judicial integrity”).

<sup>113</sup> *See* DUROSE & LANGAN, *supra* note 3.

<sup>114</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2004). The Commentary to this Canon explains that the test for impropriety is whether a conduct “would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”

<sup>115</sup> *Id.* Canon 1 cmt. *See also* *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987) (stating that the appearance of impropriety diminishes faith in the criminal justice system).

office as a “public trust”<sup>116</sup> where the judge is a “highly visible symbol of government.”<sup>117</sup>

One person to whom the judge certainly is visible is the defendant. A defendant may well expect that the individual who is *prosecuting* the case against him will be partial, biased, and antagonistic. But the individual should not have to expect such prejudice from the judge. However, how else is the defendant to interpret the judge’s “one time, for today only” offer? And since so many minorities appear in our criminal courts as the accused and as family of the accused, might not those individuals believe that it is because of their ethnicity or color that the court appears to be so unconcerned with the rights of the defendant?<sup>118</sup> Add to this, the attorney who has barely met the defendant and has engaged in no investigation, yet is aggressively promoting the prosecutor or judge’s plea offer, and it is no wonder that the perception of indigents accused of crime is that the criminal justice system is stacked against them.<sup>119</sup>

The American Bar Association was fully cognizant of the need to establish ethical standards in relationship to the plea bargaining process. Chapter 14 of the Standards for Criminal Justice is titled “Pleas of Guilty” and was recently revised to *delete* previous provisions which had permitted the judge to act as a “moderator” if the prosecution and defense counsel sought the court’s assistance in arriving at a plea bargain. The most recent edition provides that a “judge should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.”<sup>120</sup> The Commentary to this Standard emphasizes

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<sup>116</sup> MODEL CODE OF JUDICIAL CONDUCT pmbl. (2004).

<sup>117</sup> *Id.*

<sup>118</sup> Whereas there is no specific study that this commentator is aware of that reflects more discontent amongst minority defendants than that which exists amongst all defendants, it certainly is the case that the poor believe they don’t receive equal justice from our criminal justice system. As was stated by a public defender in an office in Louisiana who had petitioned the court to either increase funding for the office or to diminish the office’s caseload, “It’s safe to say that poor people get no justice in this state.” Julia Robb, *Public Defender System on Trial in Louisiana*, Alexandria Town Talk, Feb. 9, 2004, available at <http://www.criminaljustice.org/public.nsf/PrinterFriendly/Louisiana002>. If ever there is an ethical standard that can indeed be characterized as strictly “aspirational,” the history of Standard 5-1.1 of the ABA Standards For Providing Defense Services reveals that this is the one. The “quality legal representation” called for in the Standard “contemplates providing to the accused the same standard of legal services that a defendant of financial means can purchase.”

<sup>119</sup> The Chairwoman of the Chief Advisory Board of the New York State Defenders Association recently described the reaction of defendants to our criminal justice system: “Clients feel alone and lost in our state’s public defense system. They simply do not feel the protection of lawyers or the ‘guiding hand of counsel’ mandated in Gideon.” Caher, *supra* note 20, at 1.

<sup>120</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-3.3(c) (3d ed. 1999) [hereinafter PLEAS OF GUILTY].

that “direct judicial involvement in plea discussions with the parties tends to be coercive and should not be allowed.”<sup>121</sup>

Our system of federalism requires that the state courts protect an individual’s rights under the Constitution, and the state courts are to be the “primary guarantors of constitutional rights.”<sup>122</sup> Virtually every state requires that a judge upon assuming office take an oath to “support, protect and defend” the U.S. Constitution.<sup>123</sup> The Supreme Court, in *Boykin v. Alabama*,<sup>124</sup> concluded that even subtle threats from the judge concerning what might occur were the defendant to reject a proposed plea bargain, voids any subsequent plea.<sup>125</sup> In *Glasser v. United States*,<sup>126</sup> the Court declared that “[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.”<sup>127</sup> The Court used even stronger language in *Lakeside v. Oregon*<sup>128</sup> when it stated that “[i]t is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial.”<sup>129</sup> The ABA has designated similar obligations for the trial judge in its Standards for Criminal Justice: Special Functions of the Trial Judge.<sup>130</sup> The very first of the enumerated “Basic Duties” charges the judge with the responsibility for safeguarding the rights of the accused.<sup>131</sup> The language of the Standard continues with what one could well interpret to be a caveat for the judges not to act as they so often do in regard to plea bargaining: “The trial judge should require that every proceeding before him or her be conducted with *unhurried and quiet dignity*...”<sup>132</sup> Another section of the Standards instructs the judge to treat the defendant with “professional respect, courtesy, and fairness.”<sup>133</sup>

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<sup>121</sup> *Id.* at cmt.

<sup>122</sup> PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 359 (2d ed. 1973).

<sup>123</sup> See, e.g., MONT. CONST. art. III, § 3, reprinted in THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE (2001); see also, e.g., CAL. CONST. art. XX, § 3 (requiring judges to pledge to “support and defend” the Constitution); MASS. CONST. amend. art. VI (2003). Massachusetts permits a judge, if he be of the “denomination called Quakers”, to omit the words “so help me God,” and state instead, “This I do under the pains of perjury.” *Id.*

<sup>124</sup> 395 U.S. 238 (1969).

<sup>125</sup> See generally *id.* at 239–44, superseded by FED. R. CRIM. P. 11(c) (codifying the plea bargain admonishments stated in *Boykin*).

<sup>126</sup> 315 U.S. 60 (1942).

<sup>127</sup> *Id.* at 71.

<sup>128</sup> 435 U.S. 333 (1978).

<sup>129</sup> *Id.* at 341–42.

<sup>130</sup> SPECIAL FUNCTIONS, *supra* note 93.

<sup>131</sup> *Id.* Standard 6-1.1.

<sup>132</sup> *Id.* Standard 6-1.1(b) (emphasis added). The judge also has the obligation to be patient and courteous to the defendant. *Id.* Standard 6-3.4.

<sup>133</sup> *Id.* Standard 6-1.1(c).



Judges are to “carefully avoid any words or actions that could undermine the dignity of the proceedings.”<sup>134</sup>

Judicial pressuring of defendants to enter guilty pleas may violate judicial codes of conduct in two other regards. Judges are instructed to “give each case individual treatment, and the judge’s decisions should be based on the particular facts of that case.”<sup>135</sup> Yet the judge who at arraignment, or at any time prior to defense counsel having had the opportunity to investigate the allegations of his client’s criminal conduct, concludes what the plea and sentence should be, is not providing individualized justice. Too often the judge’s all-too-hurried assessment of a case gives the impression that our criminal justice system operates in a mechanical manner. The American Bar Association Committee on Legal Aid and Indigent Defendants recently conducted extensive hearings across the country involving experts detailing the workings of our system for representing indigent defendants.<sup>136</sup> The Committee’s final report concluded that judges, in their haste to get guilty pleas, “accept and sometimes even encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record.”<sup>137</sup>

Perhaps most significantly, the judge who threatens the defendant with a harsher future sentence if the defendant does not plead guilty but chooses to go to trial, is not acting in the required neutral, impartial manner. The Special Functions of a Trial Judge inform judges that they “should not demonstrate even a *hint* of partiality.”<sup>138</sup> In *Ohio v. Filchock*, the Ohio Court of Appeals strongly condemned such judicial involvement.<sup>139</sup> “It stretches the appearance of neutrality past the breaking point for a trial court to usurp the role of the prosecutor by formulating and proposing a plea bargain, and neither the State nor the Federal Constitutions will countenance such a practice.”<sup>140</sup>

One common ethical violation of prosecutors in relationship to plea bargaining occurs when requesting bail. The prosecutor is prohibited from seeking “excessive bail . . . in an attempt to coerce a plea agreement.”<sup>141</sup> Not only do the courts often close their eyes when confronted with vindictive bail requests, but the judges themselves may frequently be the very individuals who are utilizing high

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<sup>134</sup> *Id.* Standard 6-1.4 cmt.

<sup>135</sup> *Id.* Standard 6-1.1(b).

<sup>136</sup> LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 11, at 10.

<sup>137</sup> *Id.* at v. This report provides a lesson on how, in spite of so many calls for change and reform, the problems surrounding representation of indigent defendants continue. The same ABA Committee, twenty-two years earlier, issued a report of an inspection team in Michigan that had virtually the same findings. See ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR—METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 29 (1982).

<sup>138</sup> SPECIAL FUNCTIONS, *supra* note 93, at Standard 6-3.4.

<sup>139</sup> 688 N.E.2d 1063 (Ohio Ct. App. 1996).

<sup>140</sup> *Id.* at 1067.

<sup>141</sup> PROSECUTION FUNCTION, *supra* note 44, at Standard 3-3.10 cmt.

bail to obtain a plea from the defendant. Judges, especially in misdemeanor cases, may set bail that the court knows the defendant will be unable to make, and then immediately inform the defendant that were he to plead guilty, the sentence of the court would be time served and he would be released from custody. Such a pattern was illustrated by a Referee's finding, endorsed by the New York State Commission on Judicial Conduct, that a judge had coerced pleas so that "defendants had no alternative but to plead guilty and receive [the judge's] sentence so that they could be discharged from jail."<sup>142</sup> The same Judicial Conduct Commission had, a few years earlier, disciplined a Criminal Court Judge in New York City because the judge had conveyed "the explicit message that she was using bail as a coercive tactic when defendants appeared reluctant to accept the plea that was offered."<sup>143</sup>

The Supreme Court, in *Brady v. United States*, determined that a valid guilty plea must have been both "voluntary" and "intelligent."<sup>144</sup> Justification of the defendant's choice to plead guilty instead of proceeding to trial must rely on the premise that a defendant is knowledgeable to make a rational decision, contrasting the sentence he will receive for pleading guilty with what he would be likely to receive after a trial. Knowledge clearly requires that the defendant understand the elements of the offense with which he is charged, including the requisite "*mens rea*," without which there would be no criminal conduct.<sup>145</sup> However, the actual inquiry by the judge before whom the plea is to be entered is minimal indeed.<sup>146</sup> The landmark analysis of what occurs during the plea allocation (the colloquy between the judge and the defendant), which was conducted by the National Institute of Justice,<sup>147</sup> concluded that the court typically just asks the defendant "if he committed the offense" to which he is pleading.<sup>148</sup> The Institute found that the plea allocation process is "close to being a new kind of 'pious fraud',"<sup>149</sup> and that

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<sup>142</sup> N.Y. Comm'n on Judicial conduct, Bauer (Mar. 30, 2004), *available at* <http://www.scjc.state.ny.us/Determinations/B/bauer.htm>.

<sup>143</sup> See N.Y. Comm'n on Judicial Conduct, Recant (Nov. 19, 2001), *available at* <http://www.scjc.state.ny.us/Determinations/R/Recant.htm>.

<sup>144</sup> 397 U.S. 742, 748 (1970).

<sup>145</sup> See, e.g., *Henderson v. Morgan*, 426 U.S. 637, 646 (1976) (plea was not one which was knowingly and voluntarily entered when the defendant was unaware that "intent" was an element of the crime to which he pled guilty). The ABA Standards for Criminal Justice, Pleas of Guilty, require that the judge, before accepting any guilty plea, determine that the defendant understands the nature and elements of the offense that he is pleading guilty to. PLEAS OF GUILTY, *supra* note 120, at Standard 14-1.4 cmt.

<sup>146</sup> PLEAS OF GUILTY, *supra* note 120, at Standard 14-1.4 cmt. (emphasizing the importance of the judge addressing the defendant in order to ensure that the plea is made with appropriate knowledge and understanding).

<sup>147</sup> WILLIAM F. McDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES (1985).

<sup>148</sup> *Id.* at 135.

<sup>149</sup> *Id.* at 134.

judges rejected guilty pleas in only two percent of cases.<sup>150</sup> The ABA's Standing Committee on Legal Aid and Indigent Defendants, after conducting extensive public hearings throughout the country, issued a report in 2004 which assessed the quality of representation provided indigent defendants.<sup>151</sup> The Report concluded that "[a]ll too often, defendants plead guilty even if they are innocent, without really understanding their legal rights or what is occurring."<sup>152</sup>

There are a number of varying interpretations of what is required for a court to find that the defendant's plea is a voluntary one. Some courts find a plea to be entered voluntarily as long as the defendant has acted knowingly, i.e., if he is aware of what rights were being relinquished. It is more often the case, however, that a voluntarily entered plea is deemed to be one for which the defendant was not threatened, pressured or coerced. In *Machibroda v. United States*,<sup>153</sup> the Supreme Court unambiguously stated that "a guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void."<sup>154</sup>

The dilemma is a clear one: in the vast majority of pleas, the defendant has been told by his own counsel, or by the prosecutor, or by the judge, that if he chooses to go to trial he will serve a longer period of incarceration than he would if he were to enter a plea of guilty. How is that not pressure? Coercion is especially a problem when the judge, who is in the clear position to impose sentence after trial, is involved in the attempt to "persuade" the defendant to plea guilty. When the judge tells the defendant that if he chooses to go to trial he will be sentenced to the maximum sentence authorized by law, that judge is clearly able to carry out that threat. As the South Carolina Supreme Court articulated in *State v. Cross*, "a plea induced by the influence of the judge cannot be said to have been voluntarily entered."<sup>155</sup>

There is yet another very substantial concern. It is simply irrational to expect that the very judge who may have been the source of the pressure, the initiator of the threats, can then proceed to sit in judgment to determine the voluntariness of the plea. It is barely conceivable that the judge will be able, neutrally and impartially, to assess whether he himself had improperly pressured the defendant to enter his plea of guilty. The Supreme Court in *Von Moltke v. Gillies* emphasized the need for the judge, when determining the propriety of the guilty plea, to conduct "a penetrating and comprehensive examination of all the circumstances under which such plea is tendered."<sup>156</sup> Any observer of the criminal

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<sup>150</sup> *Id.* at 135.

<sup>151</sup> LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 11.

<sup>152</sup> *Id.* at 1.

<sup>153</sup> 368 U.S. 487 (1962).

<sup>154</sup> *Id.* at 493.

<sup>155</sup> 240 S.E.2d 514, 516 (S.C. 1977) (per curiam); *see also* *State v. Wolfe*, 175 N.W.2d 216, 271 (Wis. 1970) (noting that judicial participation in plea bargaining destroys the voluntariness of the plea).

<sup>156</sup> 332 U.S. 708, 723 (1948).

courts in this country would understand that a defendant's obligatory response of "No" to the judge's query, "Did anyone threaten or pressure you to plead guilty?" may very well not be an accurate reflection of what has in fact occurred.

An appeal from any entered plea is unlikely to succeed and cannot be perceived as a viable remedy for judicial coercion of a plea.<sup>157</sup> To begin with, most plea discussions occur at the bench and are only infrequently transcribed by a court reporter.<sup>158</sup> Secondly, the Supreme Court, in *Tollett v. Henderson*, held that once a defendant has admitted his guilt as part of a plea bargain, he may not at a later date raise claims as to deprivation of his constitutional or procedural rights that had occurred prior to his guilty plea.<sup>159</sup> Therefore, the defendant, by pleading guilty, will be unable to claim that there had been an illegal search or a coerced confession,<sup>160</sup> challenge the composition of the grand jury which had indicted him,<sup>161</sup> or challenge the sufficiency of the indictment on which he was charged.<sup>162</sup> The ABA Standards for Criminal Justice instruct the court to inform a defendant that, by entering a guilty plea, he is waiving his right to appeal.<sup>163</sup> The rationale for the defendant's losing the right to appeal was explained by the Eleventh Circuit in *Stano v. Dugger*: "By definition, a defendant who pleads guilty relinquishes his defense."<sup>164</sup>

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<sup>157</sup> The Supreme Court in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), established the general *per se* rule that the failure by counsel to file an appeal when requested by the defendant constitutes ineffective assistance and prejudice is presumed. Even when counsel considers any appeal to be a frivolous one, *Anders v. California*, 386 U.S. 738 (1967), requires counsel to submit a brief to the court requesting withdrawal but also referencing anything in the record that arguably might indicate support for the appeal. See *Campusano v. United States*, 442 F.3d 770 (2d Cir. 2006) (highlighting the importance of defense counsel to comply with the defendant's desire to appeal even when the defendant agreed to forfeit his right to appeal as part of the guilty plea).

<sup>158</sup> See, e.g., Norman Lefstein, *Plea Bargaining and the Trial Judge, the New ABA Standards, and the Need to Control Judicial Discretion*, 590 N.C. L. REV. 477, 504 (1981) (finding that almost 85% of the time the court stenographer rarely or never records what is discussed when the judge initiates or participates in plea discussions).

<sup>159</sup> 411 U.S. 258, 267 (1973).

<sup>160</sup> *Parker v. North Carolina*, 397 U.S. 790 (1970).

<sup>161</sup> *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966).

<sup>162</sup> *Russell v. United States*, 369 U.S. 749 (1962). But see *Haynes v. United States*, 390 U.S. 85 (1968) (court found that defendant's challenge to the constitutionality of the statute to which he pled guilty was properly raised on appeal); *Menna v. New York*, 423 U.S. 61 (1975) (*per curiam*) (double jeopardy claim may be raised on appeal after a guilty plea).

<sup>163</sup> See PLEAS OF GUILTY, *supra* note 120, at Standard 14-1.4(a)(vi). The defendant would still have the right to appeal a motion that has been made and denied, as long as the judge had expressly reserved the right for the defendant to appeal the denial.

<sup>164</sup> 921 F.2d 1125, 1148 (11th Cir. 1991). But see *Brady v. United States*, 397 U.S. 742, 757 (1970) (explaining that a guilty plea is "no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so whether conviction is by plea or by trial").

The burden on the defendant to show on appeal that his plea was not knowingly or voluntarily entered became all the more difficult after the Supreme Court's holding in *Hill v. Lockhart*.<sup>165</sup> Justice Rehnquist's opinion of the Court clearly informs lower courts that they should be reluctant to find ineffective assistance of counsel in the plea bargaining context. The Court emphasized "the fundamental interest in the finality of pleas" especially because the "vast majority of criminal convictions" arise from plea bargains.<sup>166</sup>

There are, to be sure, particular problems when the very judge who is attempting to persuade a defendant to plead guilty is to be the trial judge were the defendant to resist the judge's plea proposal. When a defendant is told by the court, as was the case in *United States v. Hutchings*, that a trial would be a "total waste of public funds and resources"<sup>167</sup> because the individual is so clearly guilty, the defendant can expect to pay dearly for his choice to go to trial. One can well conclude that a judge whose plea offer to the defendant was rejected, has an interest in the outcome of the trial that might be sharply at variance with that of the defendant. If the defendant is acquitted at trial, the judge will have been shown to have been wrong, and the defendant right, for having rejected the judge's offer.

In the eyes of the defendant, the judge who had been promoting a guilty plea is not likely to be commencing the trial with the "presumption of innocence" that the court must, ironically, instruct the jurors is required. And a defendant will be aware, perhaps due to counseling by his attorney, that there are many ways in which the trial judge can impact upon the ultimate verdict of a jury. Judges have much discretion during the course of the trial in terms of evidentiary rulings, marshalling the evidence, and charging the jury. Discretion exists as far as rulings on pre-trial motions, such as discovery, as well. It is barely conceivable that a judge who has been advocating a pre-trial plea bargain would seriously consider, independent of its merits, a motion for a judgment of acquittal after the prosecution has presented its case. A post-trial motion for the judge to overturn the jury's guilty verdict as a matter of law because the prosecutor has failed to prove his case is most certain to be denied.

The defendant, when weighing his prospects were he to choose to go to trial, may also realize that a jury may well observe the judge's negative attitude toward and lack of respect for the defendant and his case. Certainly a judge's unfriendly and unsympathetic reaction to witnesses for the defense, or to defense counsel, or to the defendant himself were he to elect to testify may well be discerned by a jury. Judges are able to communicate their biases to jurors not only by non-verbal facial expressions or gestures, but also by friendly or hostile questioning of prosecution

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<sup>165</sup> 474 U.S. 52 (1985).

<sup>166</sup> *Id.* at 58 (emphasis sharply contrasting to the earlier focus by the court on the preservation of individual rights over the desire for finality); see *Fay v. Noia*, 372 U.S. 391, 424 (1963) (stating that "conventional notions of finality . . . [c]annot be permitted to defeat . . . constitutional rights of personal liberty").

<sup>167</sup> 757 F.2d 11, 13 (2d Cir. 1985).

or defense witnesses.<sup>168</sup> It is extremely rare for appellate courts to review such prejudicial judicial misconduct. Some, albeit few, state courts have realized the unseemliness of participation in the trial by the judge who has promoted a pre-trial plea. In *State v. Falcon*, the Connecticut Supreme Court held that a trial judge's participation in plea negotiations is plain error, and actual prejudice to the outcome of the case need not be shown.<sup>169</sup> The nationwide trend, however, is at variance with the Connecticut court. Increasingly, court administrators are doing what was recently done in Minnesota where judges are assigned to a criminal case from its beginning to its termination.<sup>170</sup> The adoption of the "one judge per case" calendar assignment was designed specifically to attain early resolution of criminal matters.<sup>171</sup>

When the judge who was unsuccessful at obtaining a pretrial plea then presides at trial, the judge is unlikely to indicate on the record that the post-trial sentence is much higher than what had been offered strictly *because* the defendant rebuffed the judge and opted for trial. More commonly, trial courts may claim to be adhering to the Eighth Circuit's decision in *Hess v. United States*, which noted that it was joining a "host of other courts" when it ruled that "whether a defendant exercises his constitutional right to trial by jury to determine his guilt or innocence must have no bearing on the sentence imposed."<sup>172</sup>

Sometimes, however, the court can be very frank, clear and direct. An Ohio trial judge informed the defendant upon the jury's return with their guilty verdict: "We had the police and the prosecutor sitting down here for three days to convict you and impanel this jury and try it and *for that you're going to be punished*."<sup>173</sup> The judge wanted his lesson to be learned by all; he proceeded to explain his policy to the jurors: "[L]adies and gentlemen, I want you to know, had he [the defendant] been willing to enter a plea on this case, he would have been afforded probation. He wouldn't have gone to the institution. But now you're going to the institution."<sup>174</sup> The defendant's punishment for not entering the pre-trial plea: eighteen months.<sup>175</sup>

More commonly, the official explanation offered by the court for the very-much-enhanced post-trial sentence is that the defendant, by pleading not guilty, has

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<sup>168</sup> The Supreme Court in 1894 commented that, "[I]t is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894) (citations omitted).

<sup>169</sup> 793 A.2d 274, 277 (Conn. 2002).

<sup>170</sup> SHERBURNE COUNTY COURTS, SHERBURNE COURT INITIATIVES IMPROVE ACCESS TO JUSTICE (Feb. 12, 2003), at <http://www.mncourts.gov/district/0/?page=NewsItemDisplay&item=20118>.

<sup>171</sup> *Id.*

<sup>172</sup> 496 F.2d 936, 938 (8th Cir. 1974).

<sup>173</sup> *State v. Scalf*, 710 N.E.2d 1206, 1212 (Ohio Ct. App. 1998) (emphasis added).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1208–09.

shown that he is not remorseful. A defendant who fails to be contrite, who fails to accept responsibility for what he has done, simply needs more prison time in order to become rehabilitated. Whether it is a state court in Georgia,<sup>176</sup> or the Ninth Circuit Court of Appeals,<sup>177</sup> that is the rationale that is presented. However, this commentator, and it is suggested that virtually all seasoned observers of our criminal justice system, would maintain that remorse is a rare factor in determining a defendant's acceptance of a plea bargain. It is a cost-benefit analysis, whether engaged in by the defendant or his counsel, that determines whether or not the "bargain" will be accepted. And judges who up the ante as much as they can to get the pre-trial plea are all too aware of that.

An individual who exercises his constitutional right to trial ought not, therefore, be deemed to be "an intransigent and unrepentant malefactor."<sup>178</sup> There is no research that this commentator is aware of that shows that the "remorseful" defendant who has "accepted responsibility for his criminal act" has a lower rate of recidivism than the individual who chooses to go to trial. Yet even the commentary to the United States Sentencing Guidelines, reflecting a desire to reward those who plead guilty, stated that it would be a rare case where a defendant can "clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial."<sup>179</sup> A defendant who does choose to pursue his right to make the state prove its case against him ought not be penalized for exercising that constitutionally-protected right.<sup>180</sup>

There is yet another very significant manner in which judicially-coerced pleas of guilty may violate a defendant's constitutional rights. It can be clear to a defendant that if he exercises his constitutional right to remain silent by refusing to plead guilty, he will be punished at some future date for that choice. A coerced guilty plea may well be viewed as a coerced confession. The Fifth Amendment mandates that no person "shall be compelled in any criminal case to be a witness against himself."<sup>181</sup> It is typically the rule that one must be granted immunity from prosecution before one can be forced to incriminate oneself, and the individual can be punished for remaining silent only after such grant of immunity.<sup>182</sup> Yet in the

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<sup>176</sup> *Hooten v. State*, 442 S.E.2d 836, 840 (Ga. Ct. App. 1994) (explaining that guilty pleas are a significant indicator of rehabilitation).

<sup>177</sup> *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir. 1973).

<sup>178</sup> *Id.*

<sup>179</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.2 (2003).

<sup>180</sup> *See Corbitt v. New Jersey*, 439 U.S. 212, 233 (1978) (Stevens, J., dissenting) (recognizing that the right of an individual to require that the state prove its case against him has existed since the earliest days of the Republic).

<sup>181</sup> U.S. CONST. amend. V. *See also Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (noting that the Fourteenth Amendment Due Process Clause prohibits states from using a coerced confession against an individual).

<sup>182</sup> *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (explaining that the Fifth Amendment privilege against self-incrimination is an essential component of our American system of criminal prosecution).

plea bargaining context, not only is there no immunity offered, but the defendant will be deemed convicted of the crime immediately upon acknowledging his guilt. The Constitution does not provide for the suspension of one's rights under the Constitution due to expediency or due to the need for the rapid processing of cases by overburdened criminal courts.

One other important aspect of the plea bargaining process has not yet been discussed. There may very well be collateral consequences for a defendant who has entered a guilty plea, and these consequences may never be communicated to the defendant. The judge who informs the individual that a guilty plea today might save him years off a sentence were he to be convicted after trial, is not likely to tell the defendant that one result of today's plea might be a change in his immigration status and possible deportation.<sup>183</sup> The defendant who pleads guilty may, along with his family, be denied access to governmental benefits such as public assistance<sup>184</sup> and may no longer be eligible to reside in public housing.<sup>185</sup> It might be true for a particular defendant that the guilty plea greatly increases the likelihood that civil damages will be imposed, that the defendant will have to register as a sex offender,<sup>186</sup> or be subjected to mandatory random testing for possible use of drugs.<sup>187</sup> There are many consequences as to obtaining future employment, and in most states convicted felons lose their right to vote.<sup>188</sup>

Courts are required, when accepting a guilty plea, to inform the defendant of the *direct* consequences of that guilty plea. A ramification of a guilty plea is generally deemed to be "direct" if "it is a definite practical consequence of a defendant's guilty plea."<sup>189</sup> As the court detailed in *United States ex rel. McGrath v. La Vallee*,<sup>190</sup> "a fair description of the consequences attendant upon the prisoner's choice of plea . . . [i]s manifestly essential to an informed decision on the part of

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<sup>183</sup> The 1996 Antiterrorism and Effective Death Penalty Act Amendments to the Immigration and Nationality Act contain provisions which have broad impact on non-citizens who are convicted of felonies. See 8 U.S.C.A. § 1227(a)(2) (West 1999).

<sup>184</sup> See, e.g., ARK. CODE ANN. § 20-76-409(b) (2001); N.J. STAT. ANN. § 44:10-48(b)(7) (West Supp. 2004). Many states prohibit those convicted of drug offenses from receiving aid from state programs such as assistance for dependent children or partaking in food stamp allocations.

<sup>185</sup> The entire household may be removed from federally-funded public housing if any member of the household is convicted of a drug offense. See 24 C.F.R. § 966.4(1) (2004).

<sup>186</sup> See, e.g., ALA. CODE § 13A-11-200 (1994); CAL. PENAL CODE § 290 (West 1999). An increasing number of states are requiring not only registration, but public dissemination of the conviction for individuals convicted of an ever-increasing list of offenses.

<sup>187</sup> See, e.g., VA. CODE ANN. § 18.2-251.01 (1996) (requiring substance abuse screening and assessment for convicted felons).

<sup>188</sup> See, e.g., CAL. CONST. art. II, § 4; FLA. STAT. ANN. § 97.041 (West 2002). The impact of the loss of the right to vote has meant that minority communities in particular have lost political power due to the over-representation of minorities amongst the population of convicted felons.

<sup>189</sup> *Aguirre-Mata v. State*, 125 S.W.3d 473, 485 (Tex. Crim. App. 2003) (Holcomb, J., dissenting).

<sup>190</sup> 319 F.2d 308 (2d Cir. 1963).



the prisoner.”<sup>191</sup> For a plea to be a truly knowing and voluntary one, it is incumbent upon the judge to inform the defendant of *all* significant results that exist, or will exist, from his decision to enter a guilty plea—even if the assembly line moves slower as a result, and even if fewer guilty pleas occur.<sup>192</sup> It is perhaps especially true that when the judge’s proposed sentence does not include a period of incarceration, the defendant may be all the more unaware of the consequences that might, nonetheless, result from the plea.

The federal system has it right: judicial participation in plea bargaining is prohibited. Rule 11(c) of the Federal Rules of Criminal Procedure is succinct and absolutely clear: “The court must not participate in these discussions.”<sup>193</sup> The Rule’s “purpose and meaning are that the sentencing judge should take no part whatever in any discussion or communication regarding the sentence to be imposed prior to the entry of a plea of guilty or conviction.”<sup>194</sup> The prohibition against judicial involvement extends to precluding district court judges from even presenting a guideline to the defense counsel and the prosecutor as to what possible negotiated plea would be acceptable to the court.<sup>195</sup>

### CONCLUSION

There are some unfortunate truths about much of our criminal justice system. The expectation, more than 40 years ago when the Supreme Court decided *Gideon*, that indigent defendants would be provided with effective and competent counsel to represent them has not been realized.<sup>196</sup> The overwhelming majority of prosecutions result in plea bargains,<sup>197</sup> and all too often, counsel for the defendant has not engaged in the preparation and investigation that is constitutionally and professionally mandated before counseling the defendant on the advisability of the plea.<sup>198</sup> The only information available to the defense counsel at that time typically comes from the prosecutor and may consist of little more than the police report. The district attorney’s office is overwhelmed with cases and may indicate to the defendant that if no guilty plea is entered, the prosecutor will seek a high

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<sup>191</sup> *Id.* at 314.

<sup>192</sup> See *Kercheval v. United States*, 274 U.S. 220, 223 (1927) (holding that a plea is not valid unless the plea has been entered with a full understanding by the defendant of the consequences).

<sup>193</sup> FED. R. CRIM. P. 11(c).

<sup>194</sup> *United States v. Werker*, 535 F.2d 198, 201 (2d Cir. 1976).

<sup>195</sup> See *United States v. Fleming*, 239 F.3d 761, 765 (6th Cir. 2001); see also *United States v. Kraus*, 137 F.3d 447, 454 (7th Cir. 1998) (explaining that the rule is violated when a judge indicates that a greater term of imprisonment would have to be included in the plea arrangement to satisfy the court); see Fed. R. Civ. P. 11(c)(5) (regarding the procedure to be followed if the court rejects the plea agreement).

<sup>196</sup> See *supra* note 2.

<sup>197</sup> See *supra* note 3.

<sup>198</sup> See *supra* text accompanying notes 19–23.

bail, and a lengthy period of incarceration were the defendant to be convicted at trial.

But our focus has been on the judiciary. It is the contention of this commentator that judges have been ineffective in complying with their sworn obligation to guard the constitutional rights of the accused, and have been unprofessional by failing to adhere to the requirements and standards for judges presiding in criminal cases. When a judge succumbs to his own desire to just quickly dispose of cases and partake in assembly line justice,<sup>199</sup> he is engaging in misconduct that diminishes respect for our courts and our system of justice.

When a defendant meets his attorney for the first time at arraignment and the attorney is pressuring the defendant to immediately plead guilty, such a plea is hardly voluntary.<sup>200</sup> A client cannot be expected to have confidence in an attorney who seems so disinterested in him or in the facts surrounding the alleged crime. The defendant is bound to question whether counsel would prepare and mount an adequate defense for a trial. Yet judges often exploit the situation where a defendant feels he has no choice but to plead guilty, and are only too happy to accept the plea. The required plea allocution, where the court is required to determine whether the plea was voluntarily and knowingly entered, is typically conducted in a hurried, scripted and unproductive manner.<sup>201</sup>

The greatest concerns, however, occur in those instances where the judge himself becomes involved in the plea negotiations. The judge loses all claim to impartiality and often engages in coercion to pressure the defendant to enter a guilty plea.<sup>202</sup> Moreover, the tools to coerce are indeed available to the judge. It is the judge who determines the bail to be set and we have seen how judges may use bail to let a defendant know that he will be kept incarcerated if he insists on his right to a trial.<sup>203</sup> Judges at times coerce pleas without even informing the defendant of his right to counsel,<sup>204</sup> and the judge frequently has "assessed" the case with almost no information available except that which emanates from the police and the prosecutor. Guilt is assumed. But any proper determination of an appropriate sentence needs to be individualized,<sup>205</sup> requiring consideration of factors such as the defendant's drug addiction that might point to a drug rehabilitation program and not imprisonment as an appropriate sentence. A defendant's psychiatric history or employment record, or history of prior

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<sup>199</sup> See *supra* text accompanying notes 11–14.

<sup>200</sup> See *Colson*, 438 F.2d 1075 (5th Cir. 1971).

<sup>201</sup> See *MCDONALD*, *supra* note 147.

<sup>202</sup> See *supra* text accompanying note 153.

<sup>203</sup> See *supra* text accompanying notes 142–44.

<sup>204</sup> See *supra* text accompanying notes 136–37.

<sup>205</sup> See *SPECIAL FUNCTIONS*, *supra* note 93, at Standard 6-1.1(b) (requiring that "[t]he trial judge should give each case individual treatment, and the judge's decisions should be based on the particular facts of the case").

involvement with the alleged victim, or family obligations should also, when appropriate, be considered.<sup>206</sup> A judge who has none of this information but is just seizing the moment and all-too-rapidly determining what plea to push is acting unprofessionally.

When the judge lets the defendant know that today's offer is for-this-day-only, and that if the defendant chooses to go to trial he will be sentenced to the maximum permitted,<sup>207</sup> the defendant listens. Prosecutors, after all, only recommend; the judges are the all-powerful sentencers. And to add to this impropriety, if the defendant does yield to the judge and pleads guilty, that same judge will be the individual who determines whether the defendant's plea was "voluntarily" entered, or was coerced.<sup>208</sup>

The judge, by engaging in the plea negotiations, all too frequently becomes the defendant's adversary. Yet it is this adversary who will be conducting the trial if the defendant rejects the judge's attempts to have him plead guilty. It is this adversary who the defendant would have to rely on to rule on motions, decide what evidence will be admitted, determine whether to direct a verdict of acquittal because the prosecution as a matter of law has not proven its case, and charge the jury after marshalling the evidence. The judge may be required to instruct the *jurors* on the presumption of innocence, but in the defendant's eyes the judge has already determined the defendant's guilt.

Judges know their power to influence the course of a trial, and judges know that defendants understand this as well. This "understanding" is just one more factor that coerces innocent as well as guilty defendants to relinquish their constitutionally guaranteed right to a jury trial and give in and simply plead guilty. The defendant standing with an unprepared and uninformed counsel at his side is no match for the all-powerful judge. Such use of judicial influence and control is not "negotiation"; it is, this commentator maintains, misconduct.

As the Court stated in *Francolino v. Kuhlman*, "the mere appearance of partiality, even if unfounded, greatly undermines the credibility of the criminal justice system."<sup>209</sup> The trial judge is expected to be "the system's bastion of neutrality."<sup>210</sup> It is a given in our criminal justice system that "the Bench must be scrupulously free from and above even the appearance or taint of partiality."<sup>211</sup> The judge who presides over the trial of the defendant for the crime for which the judge has assumed guilt and promoted a guilty plea, may find it difficult to be impartial when judging the recalcitrant defendant whose mere decision to go to

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<sup>206</sup>For a list of factors which may be relevant and appropriate to utilize in determining a proper sentence, see 28 U.S.C. § 994(d) (1993).

<sup>207</sup> See *supra* text accompanying notes 99–104.

<sup>208</sup> See *supra* text accompanying note 157.

<sup>209</sup> *Francolino v. Kuhlman*, 224 F. Supp. 2d 615, 630 (S.D.N.Y. 2002).

<sup>210</sup> *Hawkins v. LeFevre*, 758 F.2d 866, 875 (2d Cir. 1985).

<sup>211</sup> *People v. DeJesus*, 369 N.E.2d 752, 755 (N.Y. 1977).

trial can be looked upon by the court as an act of defiance. There certainly is an appearance of impropriety which becomes all the more magnified when, upon a conviction, the judge makes it clear to the defendant that the sentence of the court is to be the maximum authorized by law and one that may well be perceived of as retaliation for the defendant's refusal to have pled guilty.

It is this partiality, it is this impropriety, it is this failure to adhere to the professional standards that our citizenry has every right to demand of our judiciary, that can be deemed misconduct and unprofessional. The obligations of the judiciary under the Model Code of Judicial Conduct,<sup>212</sup> the ABA Standards for Criminal Justice for the Trial Judge,<sup>213</sup> the ABA Standards for Pleas of Guilty,<sup>214</sup> and the United States Constitution envision the judge as a protector and guarantor of the rights of defendants. That is what is demanded, that is what ought to be expected, but that is which all too often simply does not occur.

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<sup>212</sup> See *supra* note 110.

<sup>213</sup> See *supra* note 93.

<sup>214</sup> See *supra* note 8.